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JOSEPH F. SPANIOL, JR.
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Nos. 87-1622, 87-1697 and 87-1711

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

PHILIP BRENDALE,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION, et al.,

Respondents.

STANLEY WILKINSON,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,

Respondent.

COUNTY OF YAKIMA, et al.,

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CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,

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On Writ of Certiorari to the United States Court of
Appeals for the Ninth CircuitBRIEF OF AMICI CURIAE
NATIONAL CONGRESS OF AMERICAN INDIANS,
ALL INDIAN PUEBLO COUNCIL, and
PUEBLO OF SAN ILDEFONSO IN SUPPORT OF RESPONDENTTHOMAS E. LUEBBEN
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QUESTIONS PRESENTED FOR REVIEW

1. Was the court of appeals correct in affirming the district court's holding in Whiteside I that the Yakima Nation has exclusive land use regulatory jurisdiction over the "closed area" of the Yakima Indian Reservation?
2. Was the court of appeals correct in reversing and remanding Whiteside II to the district court?

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. THE YAKIMA NATION POSSESSES INHERENT POWERS OF SELF- GOVERNMENT AND REGULATORY JURISDICTION WHICH APPLY THROUGHOUT ITS RESERVATION	11
II. THE LOWER COURTS IN <u>WHITESIDE I</u> CORRECTLY HELD THAT YAKIMA COUNTY IS PRECLUDED FROM EXERCISING LAND USE REGULATORY AUTHORITY IN THE CLOSED AREA OF THE YAKIMA RESERVATION.	15
III. THE EXERCISE OF CONCURRENT COUNTY LAND USE REGULATORY AUTHORITY IN THE "CLOSED AREA" WOULD INFRINGE ON THE YAKIMA NATION'S RIGHT TO SELF- GOVERNMENT.	19

TABLE OF CONTENTS continued

	Page
IV. THE COURT OF APPEALS WAS CORRECT IN REVERSING AND REMANDING <u>WHITESIDE II</u> TO DISTRICT COURT.	22
A. <u>The District Court's</u> <u>Analysis Was Incomplete</u>	22
B. <u>The District Court Did</u> <u>Not Have The Benefit Of</u> <u>Subsequent Decisions</u> . .	25
CONCLUSION	26

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES continued

OTHER AUTHORITIES:

American Land Planning Law §§1.06, 1.08 (1974)	21
Jurisdiction to Zone Indian Reservations, 53 Wash. L.Rev. 677 (1978)	21
Wilkinson Petition for Writ of Certiorari	22

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INTEREST OF AMICI

The Pueblo of San Ildefonso is a federally recognized Indian Tribe located in northern New Mexico. The All Indian Pueblo Council (AIPC)¹ is a confederation of nineteen federally recognized Pueblo Indian tribes in New Mexico. While there are notable differences among the Pueblos², all share a reverence for the lands they occupy, and all respect their duty to pass those lands to their

¹The tribes comprising AIPC are Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Picuris, Pojoaque, San Felipe, San Ildefonso, San Juan, Sandia, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zia, and Zuni.

²Five languages are spoken (Keres, Tiwa, Tewa, and Zuni). The populations of the Pueblos range from 250 members at Pojoaque, to over 10,000 at both Zuni and Laguna. The structures of tribal governments vary from centuries-old traditional governments, which function under unwritten customary law, to Indian Reorganization Act (IRA) governments, which operate under written laws enforced in American-style tribal court systems.

descendants in an unspoiled state. Amicus National Congress of American Indians (NCAI), established forty-five years ago, represents the common interests of American Indian tribes. Over 300 tribes are members of this national organization.

The Pueblo of San Ildefonso, and the member tribes of AIPC and NCAI, have a direct interest in this case based on their present or potential need to regulate land uses by Indians and non-Indians on both trust and fee lands within their reservation borders. Current land use problems at San Ildefonso present a compelling example of a tribe's need for authority to regulate the activities of non-Indians on fee lands within a reservation.

The Pueblo of San Ildefonso's federally recognized land base consists

of 26, 191 acres³, of which 785 acres are held in fee by non-Indians⁴. The majority of the non-Indian held lands are intermixed with Indian-occupied trust lands in an area of the Pueblo that falls within Santa Fe County, New Mexico.

³The Pueblo's current land base is the product of four federal actions as well as tribal purchases and exchanges of land. In 1864 the United States issued a patent to the Pueblo covering 16,200 acres of lands then controlled and occupied by the Tribe, which had been previously "granted" to the Pueblo by the Spanish Government in the Seventeenth Century. In 1929, Congress set aside an additional 4,431 acres as reservation lands, 45 Stat. 1161. The Act of September 18, 1939, 635 Stat. 604, designated 5,913 acres, known as the "sacred area", as reservation trust lands. The Act of Septmeber 14, 1961, 75 Stat. 505 added 433 acres to the Reservation. Subsequent land purchases and exchanges have resulted in San Ildefonso's current land base of 26,191 acres, all of which are "Indian Country" within the meaning of federal law. See United States v. Chavez, 290 U.S. 354 (1933); 18 U.S.C. §1151.

⁴Under the Act of June 7, 1924, 43 Stat. 636 (Pueblo Lands Act), non-Indians occupying lands within Pueblo boundaries were able to acquire fee titles.

Several of the non-Indian parcels front the Rio Pojoaque, and others overlie groundwater supplies which are critical to the successful maintenance of the Pueblo's traditional agricultural economy and to the future of the Reservation as a permanent home for the Tribe.

Until a few years ago, the eastern portion of the Pueblo, including non-Indian fee lands, was sparsely populated. Land use was largely agricultural and posed no threat to the economic security or health and welfare of Pueblo members. More recently, however, several non-Indian parcels have been subdivided, and mobile home parks have been established on lots fronting the Rio Pojoaque and overlying the Pueblo's groundwater supply. The Pueblo has a direct interest in the outcome of this case because it must have jurisdictional authority to

regulate land use on its reservation to protect its water supply and to preserve the environmental integrity of the reservation land base.

The locations of septic tanks installed by mobile home owners violate Santa Fe County regulations prescribing a minimum distance between septic tanks and the Rio Pojoaque and between septic tanks and groundwater. Leakage from the septic tanks has resulted in dangerous levels of phosphates in many of the wells recently tested. An abandoned gas station on non-Indian land in the same area of the Reservation is suspected to be the source of carcinogenic hydrocarbons detected in groundwater. Despite repeated complaints from Pueblo officials to the County that these activities pose a serious threat to the health and welfare of tribal members, there has been little, if any, enforce-

ment of applicable County laws. While recent negotiations between Pueblo and County officials are designed to resolve health and jurisdictional issues on a contract basis,⁵ an amicable and non-litigious resolution is less than a certainty.⁶ It is therefore imperative

⁵ The parties have drafted and agreed in principle on an agreement which is expected to be executed in the near future. The agreement would require the county to strictly enforce its health and welfare regulations on non-Indian fee lands within the Pueblo. Thus far the County has not questioned the Pueblo's authority to enact zoning and health and welfare regulations, and enforce such tribal laws on non-Indian fee lands located within the Pueblo. The draft agreement contains a provision expressly allowing the Pueblo to enact and enforce its own regulations in the event that the Pueblo determines that the County's laws, or the administration thereof, are inadequate to eliminate the Pueblo's concerns.

⁶ For example, the non-Indian land owners who would be affected by the agreement are not parties. If the Pueblo determines that it must enact and enforce its own regulations, a legal challenge to the Tribe's authority by a non-Indian fee holder is quite unlikely.

that this Court affirm the inherent authority of tribes to regulate the activities of non-Indians on fee lands within their reservation boundaries.

SUMMARY OF ARGUMENT

This case calls upon the Court to resolve two separate challenges to the Yakima Indian Nation's authority to regulate the use of fee lands on its reservation. In Whiteside I, Petitioner Brendale, without support from Yakima County, asks this Court to reverse the court of appeals' affirmance of the district court's holding that the Yakima Nation has exclusive regulatory jurisdiction over his property, located in the "closed area" of the Reservation. Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987). In Whiteside

II (consolidated with Whiteside I in the Ninth Circuit), this Court is asked to resolve the jurisdictional collision between the Tribe and the County over authority to regulate use of Petitioner Wilkinson's land, located in the "open area" of the Reservation.

In Whiteside I, the court of appeals correctly affirmed the district court's ruling that the Yakima Nation retains inherent authority to provide for zoning and land use regulation in the closed area, and that Yakima County is preempted from exercising regulatory authority in that part of the Reservation. Nonetheless, while the district court's preemption analysis in Whiteside I reached the right result, the court erroneously dismissed the possibility that concurrent county jurisdiction might infringe on the Tribe's right of self-government -- an

inevitable result when governments compete for the right to zone and regulate land uses on the same piece of property. In the field of zoning, once tribal authority is confirmed, a heavy burden should be placed on a competing subdivision of state government to justify the imposition of concurrent jurisdiction.⁷

In Whiteside II, the court of appeals, reversing the district court, correctly concluded that the Tribe has inherent authority to regulate land use on its reservation. The court of appeals remanded to the district court to

⁷ The district court's analysis in both Whiteside I and Whiteside II did not include discussion of the fact that only the Tribe is capable of administering comprehensive land use regulation in areas consisting of both trust and fee lands. As the court of appeals observed, the "Yakima Nation has exclusive authority to zone tribal trust land...." 828 F.2d at 534.

determine whether or not county regulation is precluded in the "open area" of the reservation as well as the "closed area". The district court's analysis of whether tribal or county authority should prevail was both incomplete and inadequate in view of subsequent decisions of this Court and the Ninth Circuit Court of Appeals.

ARGUMENT

I. THE YAKIMA NATION POSSESSES INHERENT POWERS OF SELF-GOVERNMENT AND REGULATORY JURISDICTION WHICH APPLY THROUGHOUT ITS RESERVATION.

The decisions of this Court confirm that Indian tribes retain broad, inherent powers of self-government and territorial management. Less than two years ago, all nine Justices of this Court⁸ agreed on

⁸ In Iowa Mutual Ins. Co. v. La Plante, 480 U.S. 9 (1987), Justice Stevens filed a separate opinion which did not disagree with the language quoted.

the following holding, and the authority cited to support it:

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See Montana v. United States, 450 U.S. 544, 565-566 (1981); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152-153 (1980); Fisher v. District Court, 424 U.S., at 387-389... '[T]he Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government...' Merrion v. Jicarilla Apache Tribe, 455 U.S., at 149 n. 14.

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987). In noting this Court's recognition of the federal policy of promoting tribal self-government and tribal territorial management, the Iowa decision referred to the doctrines of preemption and infringement, either one of which can serve to preclude enforce-

ment of state laws on Indian reservations.⁹

Other decisions of this Court during the current decade also support the district court's conclusion in Whiteside I that the Yakima Nation retains inherent authority to "regulate the use that Brendale makes of his fee land within the Reservation's Closed Area," 617 F.Supp. at 744, and the court of appeals' affir-

⁹"We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. [citations omitted] This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory' [citation omitted], to the extent that sovereignty has not been withdrawn by federal statute or treaty. The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively preempted by federal statute. '[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.' [citation omitted] "Id. 480 U.S. at 14.

mance. 828 F.2d at 536. In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), this Court used the following language in delineating the Tribe's retained sovereignty:

It is beyond doubt that the Mescalero Apache Tribe lawfully exercises substantial control over the lands and resources of its reservation, including its wildlife. As noted supra, ... and as conceded by New Mexico, the sovereignty retained by the Tribe under the Treaty of 1852 includes its right to regulate the use of its resources by members as well as non-members. In Montana, we specifically recognized that tribes in general retain this authority.

426 U.S. at 337.

In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), this Court affirmed the Tribe's inherent power to impose a severance tax on non-Indian enterprises doing business on the Reservation. The Merrion Court specifically held that "the Tribe retains all inherent attributes of

sovereignty that have not been divested by the Federal Government...." 455 U.S. at 149 n.14. Under the standard articulated in Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 153 (1980), the inherent powers of tribes are not divested unless their exercise conflicts with the interests of the National Government.¹⁰

¹⁰ "Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations..." 447 U.S. at 153. But see, Montana v. United States, 450 U.S. 544, (1981) (Indian tribes have been implicitly divested of their authority to regulate relations between a tribe and non-members on non-Indian fee land because of their dependent status, except where non-members enter into consensual relationships with the tribe or its members, or where the activities of non-members threaten the political integrity, economic security, or health and welfare of the tribe).

All of these cases, including Montana v. United States, supra n.10, identify retained inherent sovereignty as the source of tribal authority to regulate the activities of non-Indians on both trust and fee lands within reservation boundaries.

II. THE LOWER COURTS IN WHITESIDE I CORRECTLY HELD THAT YAKIMA COUNTY IS PRECLUDED FROM EXERCISING LAND USE REGULATORY AUTHORITY IN THE "CLOSED AREA" OF THE YAKIMA RESERVATION.

Although the analyses of the court of appeals and the district court in Whiteside I differ significantly, the result reached by both courts is correct. An analysis of the relative tribal and county interests in land use regulation in the "closed area" must lead to the conclusion that county regulation is precluded by strong tribal interests and effective tribal regulation.

The district court used a federal

preemption analysis to reach the conclusion that land use regulation by Yakima County in the "closed area" is precluded. The district court rejected the applicability of the test of whether County regulation constitutes an infringement on tribal sovereignty¹¹ on the grounds that "Since the infringement barrier is derived from the right of tribal self-government, it is primarily applicable where intratribal relations are implicated." Yakima Indian Nation v. Whiteside, 617 F.Supp. 735, 746 n.11 (E.D. Wash. 1985) (Whiteside I). The district court concluded, after considering competing federal, tribal, and county

¹¹ The infringement doctrine, still vital today, was first announced by this Court in Williams v. Lee, 358 U.S. 217 (1959), which held that the application of state laws on reservations is precluded if they would infringe "on the right of reservation Indians to make their own laws and be ruled by them." Id. at 220.

interests, that under the circumstances county regulatory jurisdiction is preempted by federal law. The court went on to note that if the infringement analysis were applicable, that court would conclude that the Tribe and the County had concurrent land use regulatory authority.¹²

The court of appeals, on the other hand, reached the same end result utilizing a tribal self-government infringement analysis. The appeals court

¹²"Since the infringement barrier is derived from the right of tribal self-government, it is primarily applicable where intratribal relations are implicated. [citation omitted] Yakima County's Regulation of Mr. Brendale's property does not violate the right of tribal self-government. Concurrent jurisdiction over Brendale's property would require them to comply with the regulations of Yakima County and the Yakima Nation. Thus, Yakima County would not be infringing on the Yakima Nation's right to 'make their own laws and be ruled by them.' [citations omitted]" 617 F.Supp. at 746 n.10.

expressly rejected the federal preemption analysis, although it noted that "federal policy ... informs our inquiry concerning the reach of Indian sovereignty." 828 F.2d at 533. After concluding that the Yakima Nation has the authority to zone non-Indian fee land throughout the Yakima Reservation as a matter of retained, inherent, sovereign tribal governmental powers, the court went directly to a balancing of tribal and county interests in land use control and affirmed the district court's holding that county regulation in the "closed area" is precluded. Amici submit that the court of appeals' analysis is the correct one, and should be specifically affirmed by this Court.

Where tribal and state jurisdiction is concurrent, and the tribe has acted to exercise its governmental authority with

respect to the particular matter at issue, a balancing of relative tribal and state interests must be undertaken whether the preemption analysis or the infringement analysis is applicable.

III. THE EXERCISE OF CONCURRENT COUNTY LAND USE REGULATORY AUTHORITY IN THE "CLOSED AREA" WOULD INFRINGE ON THE YAKIMA NATION'S RIGHT TO SELF-GOVERNMENT.

Both the district court and the court of appeals found that the Yakima Nation has the right to promulgate and enforce tribal zoning laws in the closed area of the Reservation. This right is an essential aspect of self-government. It would certainly be infringed upon if Mr. Brendale could circumvent tribal zoning laws through compliance with the County's conflicting ordinance. We cannot see how the district court could find that proceeding with the proposed subdivision,

under the authority of the County's ordinance, posed "a threat to the political integrity... of the Yakima Nation," 617 F.Supp. at 744, yet also conclude that County regulation of the Brendale property would not violate the Tribe's right of self-government. 617 F.Supp at 746 n.10. Unlike the field of taxation,¹³ concurrent zoning authority would nullify the important governmental objectives of the Tribe's zoning or-

¹³ See, Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 158 (1980) (state taxation of cigarette sales on the Reservation would not interfere with the Tribe's right to assess its own tax). See also, Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1393 (9th Cir. 1987): In contrast to taxation, enforcement of the cities' rent control ordinances would nullify the Tribe's authority to regulate the use of its lands and concurrent jurisdiction would violate the Tribe's right to make its own laws and be ruled by them.

dinance,¹⁴ and negate the positive effects of comprehensive land use regulation,¹⁵ which only the Tribe is capable of carrying out.¹⁶ In this respect, we readily concede the following argument of Petitioner Wilkinson in his Petition for Writ of Certiorari to this Court.

¹⁴ As the court below appreciated, by "enacting zoning ordinances, a tribe attempts to protect against the damage caused by uncontrolled development, which can affect all of the residents and land of the reservation. Tribal zoning is particularly important because of the unique relationship of Indians to their lands." 828 F.2d at 534.

¹⁵ Citing N. Williams, American Land Planning Law §§1.06, 1.08 (1974), and Jurisdiction to Zone Indian Reservations, 53 Wash. L.Rev. 677, 679, 685 (1978), the court of appeals recognized the importance of planning for coordinated uses of land in a particular area, which "enables a centralized regulatory authority to balance the competing needs of landowners and to distribute land uses in a desirable pattern." 828 F.2d at 534.

¹⁶ See supra n.7.

Zoning, however, is not suitable for concurrent jurisdiction. Zoning regulations will frequently directly conflict, requiring deference to one or the other of the zoning authorities. Cf. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) ("concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation").

Petitioner Wilkinson, Petition for Writ of Certiorari at 11. Once tribal authority to zone a particular area is confirmed, a trial court should place a heavy burden on the competing state entity to justify the imposition of concurrent jurisdiction.

IV. THE COURT OF APPEALS WAS CORRECT IN REVERSING AND REMANDING WHITESIDE II TO DISTRICT COURT.

A. The District Court's Analysis Was Incomplete

In analyzing the issue of tribal authority in Whiteside II, the district court expressed understandable uncertain-

ty.¹⁷ Unlike the court of appeals,¹⁸ however, in reviewing applicable law, the district court did not even mention this Court's decision in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), that held that tribal powers are not implicitly divested because of the dependent status of tribes, *id.* at 153, a holding directly contradicted nine months later in Montana v. United States, 450 U.S. 544, 563-64 (1981).

Neither did the district court attempt to reconcile this Court's post-Montana statement that tribes retain "all inherent attributes of sovereignty that

¹⁷"Unfortunately, the parameters of that power are anything but settled..." 617 F.Supp at 757.

¹⁸"The Supreme Court has, without apparent consistency, applied two tests to determine the limit on tribal authority over the conduct of non-Indians." 828 F.2d at 533

have not been divested by the Federal Government..." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982).¹⁹ The authority of the Tribe derived from the Treaty With the Yakimas, 12 Stat. 951, was similarly overlooked. Under these circumstances, the district court's analysis of tribal authority and application of the law was less than complete.

¹⁹ While noting the Tenth Circuit's application of the Montana test in Knight v. Shoshone & Arapahoe Tribes, 670 F.2d 900 (10th Cir. 1982), the district court did not mention the Tenth Circuit's reliance on the Merrion decision in holding that tribal "power to control use of non-Indian owned lands located within the reservation flows from the inherent sovereign rights of self-government and territorial management," 670 F.2d at 903, or the Knight court's finding that the tribal zoning ordinance involved was substantially related to the general welfare of the Reservation's residents. Id.

B. The District Court Did Not Have The Benefit Of Subsequent Decisions

Following the district court's decision in Whiteside II, the Ninth Circuit and this Court rendered decisions which provide additional guidance on the scope of tribal regulatory authority over reservation lands. In Segundo, supra, the Ninth Circuit held that "[i]t is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its lands." 813 F.2d at 1393. This Court's decision last year in Iowa Mutual Ins. Co. v. LaPlante, supra, is particularly significant in light of the district court's rigid application of the Montana test of tribal authority.²⁰

²⁰ The Iowa Mutual Court's recognition of tribal authority over the activities of non-Indians on reservation lands, and its adherence to the doctrine that tribes retain all attributes of sovereignty that have not been divested by the Federal Government, 480 U.S. at

The Ninth Circuit's analysis squarely faced the problem of contradictory authority, whereas the district court chose to ignore it. The circuit court's thorough consideration of applicable authority contrasts sharply with the district court's incomplete review. Finally, the district court did not have the benefit of considering applicable decisions issued subsequent to its 1985 ruling in Whiteside II. Accordingly, this Court should affirm the circuit court's remand of Whiteside II to the district court.

CONCLUSION

The ability of American Indian tribes to maintain their political, economic, and cultural integrity, and to protect

14, manifest the inadequacy of a narrow application of the Montana test of tribal authority over non-Indians engaged in activities on reservation lands.

and provide for the health and welfare of both Indian and non-Indian reservation residents, depends upon whether the tribes can effectively govern within the reservation boundaries. An increasingly important aspect of governance on Indian reservations is land use control. The analysis of the court below was correct and should be affirmed.

Respectfully submitted this 4th day of November, 1988.

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